

No. 20,428

United States
COURT OF APPEALS

for the Ninth Circuit

ARTHUR ANDERSON and CLATSOP
FISHERIES, INC., an Oregon corporation,

Appellants,

v.

GENE R. NADON, DOROTHY IRENE
NADON, and JATABORO CORPORATION,
a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS

*Appeal from the United States District Court
for the District of Oregon*

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REPLY BRIEF

The Claims and Their Value

Petitioners assert that there are multiple claims having a value far in excess of the limitation fund (Appellees' Br. 3).

The record shows that the two-man crew of the F/V

BETTY received full payment of damages in the amount of \$773.27 (R. 25) and \$885.67 (R. 26) respectively from the owner of the F/V BETTY, Clatsop Fisheries, Inc. Each has executed a further acknowledgment of full payment and promises not to assert any claim against the F/V EAGLE or her owners (R. 23-24), and as a matter of fact neither has filed a claim and the time for filing claims expired on July 13, 1965 (R. 11). Surely, even appellees with all their fears of a multiplicity of claims, must concede that crewmembers Linville and Winters are neither actual nor potential claimants.

Petitioners urge that as Linville and Winters may have had claims for personal injuries, such claims were not assignable to Clatsop Fisheries as trustee and imply that therefore such claims are still held by Linville and Winters (Appellees' Br. 7-8). The question of whether or not the "trustee" can prosecute or abandon the claims¹ is irrelevant to the question of whether or not Linville and Winters are claimants. Linville and Winters, as noted, have been *fully* paid, disclaim any rights against petitioners and are now time-barred from making a claim.

The other claims are for loss of the F/V BETTY and the master's personal effects. The master, Arthur Anderson, is president of Clatsop Fisheries, owner of the F/V BETTY (R. 18). Mr. Anderson's claim is for approximately \$650 (R. 20). The total for individual losses is \$2,308.94. In order to save petitioners the burden of

¹ The vesselowner is charged with the responsibility of asserting a claim to recover the lost lays or shares of the crew. *Van Camp Sea Food Company, Inc. v. DiLeva*, 171 F.2d 454 (C.A. 9, 1948); *U. S. v. Latlin*, 24 F.2d 683 (C.A. 9, 1928).

contesting the individual claims, Clatsop Fisheries has agreed that the claims be paid in full out of the limitation fund before payment to Clatsop Fisheries for loss of the F/V BETTY (R. 27-28). Petitioners' efforts to paint a picture of themselves as defending a multiplicity of litigation is fruitless; it is apparent that there will be but two suits in this case, one in the state court in Astoria for loss of the F/V BETTY, and one in the district court in these limitation proceedings.

In *San Jacinto*, 238 F. Supp. 928 (E.D. Va. 1965), relied on so heavily by the appellees (Br. 5-6), twenty-five Jones Act claimants filed claims totalling \$10,000,000 against a fund of \$900,000 (an 11-1 ratio). Whatever merits there are in the holding of the *San Jacinto*, none of the reasons are valid in this case. Furthermore, the court expressly reserved the question of whether the claimants could pursue their claims before a jury if limitation were denied.

Limitation and the Limitation Fund

The appellees contend that by contesting limitation (Appellees' Br. 8) and the value of the fund (Appellees' Br. 10), appellants are foreclosed from proceeding in the state court.

Appellants have found no reason in support of the appellees' position. On the contrary, in forcing claimants to concede either or both limitation and value, the admiralty court would effectively deny access to the state court. Appellants will offer evidence that the BETTY and the EAGLE are each worth approximately \$65,000.

So long as the right to limitation (R.S. 4283) and the setting of the stipulation (R.S. 4285) are left with the district court, the owners of the EAGLE here obtained all that they have been promised by Congress.

On the question of the right to limitation, the Second Circuit has held that a waiver of "any claim of res judicata relevant to the issue of limited liability" is sufficient protection of the petitioner's rights. *Petition of Red Star Barge Line, Inc.*, 160 F.2d 436, 438 (C.A. 2, 1947) cert. den. 331 U.S. 850. Here appellants filed just such a waiver (R. 21). The court held that the only concession required is that the petitioner may litigate his right to limitation in the admiralty court.

In the case of *W. E. Hedger Transportation Corporation v. Gallotta*, 145 F.2d 870 (C.A. 2, 1944), the claimant was allowed to proceed in the state court after filing a consent to the petitioner's right to limit and that value be fixed in the limitation proceeding. The court held that after the filing of the consent the admiralty court retained jurisdiction only for fixing value.

In *The Lotta*, 150 Fed. 219 (E.D.S.C. 1907), subsequently cited with approval in *Langness v. Green*, 282 U.S. 531, the district court held that the value of the petitioner's vessel could be decided in the state court proceeding. This court has approved an order that the value of the petitioner's vessel should be determined in the state court. *Red Bluff Bay Fisheries, Inc. v. Jurjev*, 109 F.2d 884 (C.A. 9, 1940). It seems inescapable to conclude that if the value of the petitioner's vessel were to

be determined in the state court case, the stipulation for value could not be set until then.²

It thus appears that the claimant is entitled to litigate both the issue of value and limitation in the admiralty court and also have his state court trial to determine his damages.

The District Court's Discretion

The district court and appellees (Br. 11) seem to contend that appellants have to formulate some special reason or circumstance entitling Clatsop Fisheries to proceed in the state court. No case authority is cited for such a proposition and appellees have advanced no reason for such a rule. The "saving to suitors" clause does not require reasons for wanting a jury trial in a state court.

It is interesting to note that the district court never pointed out why Clatsop Fisheries should not be permitted to proceed in the state court or what kind of showing is needed. Appellants offered to take all necessary steps entitling Clatsop Fisheries to a state court trial (Vol. II, R. 4). As a consequence, appellants were never advised whether the priority consent was inadequate or whether it would be necessary to give up the claims to recover for Mr. Anderson's losses and payments to Linville and Winters.

² In *The Lotta*, *supra*, at pp. 222-223, the district court noted that the stipulation was set on the basis of ex parte appraisals by persons chosen by the petitioner and that the claimant ought to have the opportunity to be heard. The same situation prevails here.

CONCLUSION

Appellants have agreed to all that is reasonably necessary to protect appellees' limitation rights and, therefore, the order of the district court denying appellant Clatsop Fisheries, Inc. access to the state court should be overruled.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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